

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE 1996 SESSION

**FILED**  
February 12, 1997  
Cecil W. Crowson  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 Appellee )  
 )  
 V. )  
 )  
 JIMMY LEE JONES, )  
 )  
 Appellant. )  
 )  
 )

No. 01C01-9511-CR-00367  
DAVIDSON COUNTY  
HON. THOMAS H. SHRIVER,  
JUDGE  
(Aggravated Child Abuse)

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OPINION FILED: \_\_\_\_\_

REVERSED AND DISMISSED

William M. Barker, Judge

## OPINION

Appellant, Jimmy Lee Jones, appeals as of right his convictions in the Davidson County Criminal Court of two counts of aggravated child abuse. He received the minimum sentence of eight years on each offense as a Range I standard offender. The sentences were ordered to run concurrently.

Appellant argues on appeal that:

- (1) the evidence was not sufficient to support the conviction;
- (2) the trial court erred in denying him probation; and
- (3) the trial court committed plain error in allowing separate convictions for two counts of aggravated child abuse where the State failed to prove separate criminal episodes.

Although not assigned as error on appeal, we have determined that plain error exists with respect to the admission of an out-of-court hearsay statement made by Tonya Medley to Dr. Michael Tramontana. The hearsay statement was crucial and devastating to the appellant, and we conclude that it deprived him of his constitutional right to a fair trial. Moreover, without the hearsay statement, the evidence at trial was insufficient to support the convictions. Accordingly, we have no choice but to reverse the appellant's convictions and dismiss the case.

On the evening of Saturday, May 7, 1994, seven-month-old James Ronald Rose was taken to Vanderbilt Hospital. The doctors in the emergency room discovered that he suffered from a broken arm, a broken leg, a skull fracture, a circumferential hand grip bruise on the left arm, bruises on the left ear, upper thigh bruises, numerous scratches on his face, and bruises and scratches on the lower scrotum and rectal area. Doctors quickly concluded that the injuries were not consistent with the explanation provided and suspected that James had been abused. He was hospitalized for six days.

The Department of Human Services and the Metro Police Department were notified and an investigation ensued. Investigators determined that James and his

mother, Tonya Medley, were living in a motel room with appellant. Tonya and appellant were interviewed several times in the course of the investigation, as was Tonya's mother Cathy Medley. The investigation revealed that appellant and Tonya were the only persons who had contact with James during the times when the child sustained the injuries. It was also learned that Cathy Medley had discovered James' injuries and insisted he be taken to the hospital.

Appellant gave statements to authorities on three different occasions. These statements reflect several inconsistencies about the time of the child's injuries and the events surrounding them. Tonya also talked with authorities numerous times. Her accounts varied substantially, ranging from the story that the child had "hopped" out of his crib to utter ignorance of how the child obtained some of his injuries. Likewise, Cathy Medley's statements were at times contradictory to the explanations provided by Tonya and appellant. Ultimately, Tonya's statements culminated in her taking full responsibility for the child's abuse. However, this occurred after appellant was arrested for the abusive acts.

The investigation was complicated by the fact that Tonya suffered from permanent brain damage. This was the result of an accident that occurred when she was seven years of age. Cathy Medley said that Tonya is "kindly like a mentally-retarded person. She only has, like, a two-year-old mind inside of her." This was evidenced by the fact that Tonya demonstrated a marked inability to distinguish between a.m. and p.m. in several of her interviews. Although Tonya was James' primary caretaker, appellant was indicted on six counts of aggravated child abuse. Because of her age, charges were brought against Tonya in juvenile court.

The State introduced testimony from several witnesses at trial, including James' treating and attending physicians, Tonya's mother and father, the detective from the Metro Police Department, an investigator from the Department of Human Services, and a psychologist who evaluated Tonya's mental capacity. Both the emergency department doctor and the treating pediatrician opined that James' injuries were not

consistent with the explanations provided. They testified that a small child could not “hop” out of a crib, as explained by Tonya, nor could the multiple fractures have resulted from such a fall. The doctors concluded that the injuries were intentionally inflicted and had occurred over a period of time. The injuries likely resulted from the child being forcefully struck into a firm object or a firm object being forcefully struck against the child. The doctors could not determine if more than one person had inflicted the injuries. Neither could they conclude that the abuse was inflicted by a male or female.

In its case-in-chief, the State introduced numerous statements that Tonya made. Because Tonya sought Fifth Amendment protection and did not testify, these were primarily offered through testimony of other witnesses. In one instance, a tape was played from a recorded phone conversation with the detective. Some of these hearsay statements were offered as substantive evidence. Others, however, were obviously introduced to impeach Tonya as they were exculpatory of the appellant. Most of the statements were properly admitted under an exception to the hearsay rule, although several were rank hearsay.

The State had no direct evidence that appellant inflicted the abuse on James. Appellant worked during the day and some evenings and did not care for the child often. None of the witnesses who testified could ever place appellant alone with James, nor had anyone seen him spank or discipline the child. A rational trier of fact could have concluded that appellant had the opportunity to abuse the child, i.e. he may have been with James during a portion of the time the injuries were inflicted, but the evidence proved little more.

The most damaging evidence against appellant was a statement that Tonya made to a psychologist. During an evaluation of Tonya’s mental capacity, Dr. Michael Tramontana administered a sentence completion exercise to her. When given the statement “I regret”, Tonya completed it by saying “For I did. I did half the stuff.” This was in reference to the injuries sustained by James. The obvious implication was that

if Tonya inflicted half the injuries, appellant inflicted the remaining half. Although inculpatory of the appellant, no objection was lodged to the admission of this hearsay statement.

At the conclusion of the State's proof, appellant moved for a judgment of acquittal on all six counts. The trial court granted acquittals on counts four and six of the indictment. Those counts were for the bruised scrotum and rectum. The court found these injuries did not amount to "serious bodily injury" within the meaning of the statute defining aggravated child abuse. Defense proof consisted of one doctor's testimony about Tonya's mental condition. Appellant did not testify.

The State elected offenses as follows: count one - fractured left humerus; count two - fractured left fibula and tibia; count three - fracture of the right parietal area of the skull; count four - scrotal hematoma; count five - bruised area of the buttocks, including the flank area; and count six - bruised area of the rectum. In light of the acquittals, the jury was instructed on the lesser offense of child abuse for counts four and six.

The jury found appellant guilty of aggravated child abuse on counts one, two and five. At the hearing on the motion for new trial, the trial court found that the State did not prove beyond a reasonable doubt that the injury alleged in count five was serious bodily injury. A new trial was granted on that count.

Appellant does not raise any issue with respect to the hearsay statements of Tonya Medley that were admitted. We recognize that appellate review regularly extends only to those issues presented for review. Tenn. R. App. P. 13(b). However, both the Rules of Criminal Procedure and the Rules of Appellate Procedure recognize that an appellate court may consider issues not presented for review if they rise to the level of "plain error." See Tenn. R. Crim. P. 52(b) and Tenn. R. App. P. 13(b). These matters lie within the sound discretion of the appellate court and may be addressed to prevent needless litigation, prevent injury to the interests of the public, prevent

prejudice to the judicial process, prevent manifest injustice, or to do substantial justice. State v. Adkisson, 899 S.W.2d 626, 638-39 (Tenn. Crim. App. 1994).

Raising an issue on the basis of plain error should not be taken lightly; it is not a routinely-administered remedy. Id at 639. It should only be invoked in the face of an egregious error which affects the substantial rights of the accused. Id at 639-40. A substantial right is a right “of fundamental proportions . . . , a right to the proof of every element of the offense, and is constitutional in nature.” Id at 639 (citations omitted). Where, as here, the only evidence of appellant’s guilt was contained in obvious hearsay, a substantial right has been violated. Recognition of the error is necessary to protect the fairness and integrity of judicial proceedings. See id at 640.

To aid the appellate courts in determining when application of this extraordinary remedy is proper, the following considerations have been outlined: (1) the record must clearly establish what occurred in the trial court; (2) a clear and unequivocal rule of law must have been breached; (3) a substantial right of the accused must have been adversely affected; (4) the accused did not waive the issue for tactical reasons; and (5) consideration of the error is necessary to do substantial justice. Id at 641-42. Because the appellant’s constitutional right to a fair trial, a substantial right, was impaired in an extremely prejudicial manner by the admission of Tonya’s hearsay statements made to Dr. Tramontana, we believe plain error was committed.

A defendant’s right to a fair trial is as old as our nation and is a fundamental constitutional right. The right is substantial and there is no reason apparent in this record indicating a waiver of that constitutional right for tactical reasons. Finally, without Tonya’s hearsay statement, there was a dearth of evidence against appellant and the convictions should never have resulted. When the error is of such magnitude that it probably changed the outcome of the trial, plain error has occurred. Adkisson, 899 S.W.2d at 642.

When the jury was allowed to hear Dr. Tramontana’s testimony that Tonya’s sentence completion statement was, “I regret. For I did. For I did half the stuff,” it was

presented with a statement by a person, not present nor testifying, directly inculcating the defendant, who could not challenge that declarant's veracity on cross-examination. The statement was a classic example of hearsay. Hearsay is a statement made out of court used in court to prove the truth of the matter asserted. See Tenn. R. Evid. 801(c). Tonya's statement was made out of court, specifically in a mental health setting. It was used in court when Dr. Tramontana repeated her statement and it was used by the State to prove the truth of the matter asserted - that appellant was responsible for at least half the injuries to the child.

Hearsay evidence is generally inadmissible due to its unreliable nature. See Neil P. Cohen et al, Tennessee Law of Evidence §801.2 at 491 (3d. ed. 1995) and Tenn. R. Evid. 802. However, it may be admissible if it falls within one of several exceptions to the rule, which generally provide some assurance of reliability. Id at 492. See also Tenn. R. Evid. 803. At appellant's trial, no exception to the hearsay rule was offered to justify admission of Tonya's statement. Furthermore, our independent review of the record reveals that no hearsay exception was applicable to admit this prejudicial statement. At first glance, the exception for statements made for purposes of medical diagnosis and treatment appears to apply. See Tenn. R. Evid. 803(4). However, this exception fails because Dr. Tramontana was a psychologist and the exception applies only to medical doctors. See State v. Barone, 882 S.W.2d 216, 220 (Tenn. 1993). Also, we note that the statement Tonya made to the doctor was not for the purposes of diagnosis and treatment. She visited Dr. Tramontana only for an evaluation of her mental capacity. Thus, it is clear that the statement was not covered by this, or any other, exception to the hearsay rule.

The admission of the hearsay statement at appellant's trial violated the Tennessee Rules of Evidence. The substantive prejudice appellant suffered as a result of this procedural error was the inability to test the declarant's sincerity and memory through cross-examination. See Neil P. Cohen et al, Tennessee Law of Evidence §801.2 at 491 (3d. ed. 1995). The extensive variations in the proof offered

at trial exemplifies the compelling need for this truth-testing to protect appellant's right to a fair trial. The State introduced several statements that Tonya made and these statements demonstrate numerous inconsistencies. It is obvious that Tonya was not a credible declarant and this was compounded by her limited mental capacity. Her stories ranged from her taking no responsibility for the injuries to taking full responsibility for them, as well as sometimes providing detailed explanations of the child's injuries and later purporting utter ignorance of how some of them occurred. In light of the above considerations, we find it difficult to imagine a case where there was a more compelling need for cross-examination. We hold that the trial court's admission of the unreliable hearsay statement was reversible error.

This conclusion is inescapable when we consider the nature of the hearsay evidence. While the error in admitting a hearsay statement may often play a small role in the overall scheme of a trial, such is not the case here. Cf. State v. Walker, 910 S.W.2d 381, 388 (Tenn. 1995); State v. Dickerson, 885 S.W.2d 90, 91 (Tenn. Crim. App. 1993) and State v. Young, 866 S.W.2d 194, 198 (Tenn. Crim. App. 1992) (cases finding that the admission of inadmissible hearsay evidence was harmless error). The impact of Tonya's statement could only be considered crucial and devastating. It was the only direct evidence offered by the State to demonstrate appellant's guilt. None of the witnesses who testified for the State directly implicated appellant in the abuse of the child. None of the medical evidence was indicative that a male had inflicted the injuries on the child. Neither had anyone witnessed the appellant abuse the child, nor could any one place the appellant alone with the child. At best, the evidence may have demonstrated that appellant had an opportunity to abuse the child, but nothing more. In this case, Tonya's hearsay statement was clearly *the* crucial element in the State's proof. As such, we are compelled to find that it was impossible for appellant to receive a fair trial when the only evidence of his guilt was provided by an extremely prejudicial and unreliable hearsay statement made by a

declarant of questionable veracity. See State v. Catherine Ward, No. 01C01-9307-CC-00224 (Tenn. Crim. App. at Nashville, February 2, 1996) (hearsay testimony that provided the only direct evidence of the intent to commit the crime was prejudicial and could not be considered harmless) and State v. Myers, 764 S.W.2d 214, 216 (Tenn. Crim. App. 1988) (hearsay evidence that was devastating to appellant could not be considered harmless when the proof of guilt is not overwhelming).

After excluding this prejudicial statement, it is incumbent upon us to examine the remaining proof in the record and test its sufficiency. The strongest view of the proof demonstrates only that appellant was with James at some time during the period that the injuries were inflicted. Merely placing the infant in the appellant's presence during the relevant time period is insufficient to prove beyond a reasonable doubt that he inflicted the injuries. See State v. Hix, 696 S.W.2d 22, 24 (Tenn. Crim. App. 1984).

Furthermore, determining the culpable party or parties was mostly a matter of speculation for the jury because of the nature of the evidence. From the proof, it was impossible for the jury to conclude beyond a reasonable doubt that the abuse was inflicted by appellant, Tonya, or both. We may not permit a conviction to rest solely upon conjecture, guess, speculation, or a mere possibility. See State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987). In sum, the record is wholly devoid of any direct evidence that appellant knowingly inflicted serious bodily injury upon the child as required by Tennessee Code Annotated section 39-15-402.

Similarly, the State's theory of criminal responsibility pursued at the motion for new trial also fails. The record contains no evidence that appellant solicited, directed, aided or attempted to aid Tonya in the infliction of serious bodily injury. See Tenn. Code Ann. §§39-11-401 - 402 (1991). Finally, any remaining circumstantial evidence against the appellant simply does not exclude beyond a reasonable doubt every other reasonable hypothesis save the guilt of the defendant. State v. Crawford, 470 S.W.2d 610, 612 (Tenn. 1971). Although there is evidence that appellant gave conflicting statements to investigators, this standing alone is insufficient to prove his guilt beyond

a reasonable doubt. Therefore, we find the evidence, both direct and circumstantial, insufficient to support appellant's convictions.

It is beyond dispute that the infliction of serious injuries upon a seven-month-old child is a reprehensible crime. Human nature cries out for punishment. However, allowing another injustice to be added to these unfortunate circumstances provides no remedy. In sum, we find that hearsay evidence was admitted in violation of the appellant's constitutional right to a fair trial and that exclusion of such proof leaves a dearth of evidence to support appellant's guilt. Although the proof may establish culpability for a conviction of aggravated assault if ". . . the parent or custodian of a child . . . intentionally or knowingly fails or refuses to protect such child from an aggravated child abuse. . .," Tennessee Code Annotated section 39-13-102(b) (emphasis added), the State did not charge this offense. Therefore, we dismiss appellant's convictions for lack of sufficient evidence. Discussion of the issues raised by appellant is unnecessary.

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William M. Barker, Judge

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John H. Peay, Judge

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David G. Hayes, Judge